Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1417

Carl D. Bartholomew, D.C., et al.,

Petitioners

-versus-

Virginia Chiropractors Association, Inc., et al,

Respondents

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT:

I. This Court should grant writs to resolve the many conflicting decisions in the trial and appellate courts throughout the country and provide a definitive decision in this area. 1

TABLE OF AUTHORITIES

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This brief is submitted on Petitioners behalf in reply to Respondent's brief in opposition to the Petition for a Writ of Certiorari.

Respondents' brief suggests that the cases cited by Petitioners ". . . simply reflected differences in the facts presented," (Respondents' Brief at 12), and that there are actually no conflicts within the Courts of Appeals or District Courts.

As Respondents argue, the cases cited other than Pireno v. New York State Chiropractic Association, 1972-2 (CCH) Trade Cases ¶62,758 (S.D., N.Y., 1979), do not involve peer review. The issues and opinions cited, however, are certainly applicable to the case at bar.

Liberty Glass Co. v. Allstate Insurance Co. 1980-1 Trade Cases ¶63,014, (5th Cir. Nov. 21, 1979) involved an alleged combination and conspiracy between insurers and glass installers and manufacturers to fix prices for automobile glass replacements in automobiles covered by the insurers, to eliminate competition by boycotting the plaintiffs and to monopolize interstate trade and commerce. The District Court entered summary judgment for defendants on the basis that any agreement between defendants related to the satisfaction of claims under the policies constituted the business of insurance,

and that the McCarran exemption extends not only to insurers, but also to those with whom an insurer contracts to discharge it's policy obligations. On appeal, the Fifth Circuit held that this Court's opinion in Group Life and Health Ins. Co. v. Royal Drug Co., 440 U. S. 205, (1979), required its reversal of the District Court. The Court looked extensively to the spreading of risk analysis of Royal Drug and concluded that the conduct alleged in Liberty Glass merely reduced insurers costs but did not spread risk.

In Arizona v. Marcicopa County Medical Society, et al., 1980-1 (CCH) Trade Cases, ¶63,239 (9th Cir. 1980), challenged activities include periodic polling of members of foundations for medical care (FMCs) to set upper limits on fees to charge patients covered by insurance plans the FMCs approved. Also challenged was the exchange of price information among doctors, by inter alia establishing and main-

taining relative value schedules and conversion factors. These activities (also alleged in the instant case) were held to be beyond the business of insurance.

Likewise in United States v. American Society of Anesthesiologists 1979-2 Trade Cases ¶62,739, (S.D., N.Y. June 22, 1979) relative value guides were sought and encouraged by insurers and adopted, published and circulated by an anesthesiologist's association. While the Court dismissed on other grounds, one defense raised by defendants was that of McCarran Immunity. The Court by way of footnote, suggested it "unlikely" that McCarran would apply to that factual situation.

Proctor v. State Farm Mutual Automobile Insurance Co., 561 F. 2d, 262 (D.C. Cir. 1977) vacated and remanded, (47 U.S.L.W. 3586) (U.S. March 5, 1979), involves claims that defendants: (1) fixed prices at which automobile

repairs are made; (2) coerced and intimidated repair shops to complete work at that price; and (3) boycott shops which refused to accede to the fixed rates. The Court of Appeals in finding the alleged activities to be the business of insurance, held:

> "The determination by the insurance company of the amount to be paid in discharge of this contractual obligation is at the heart of the relationship between insurer and insured, and is directly connected with the reliability, interpretation, and enforcement of the insurance contract."

Proctor at 267.

The Court continued "Not withstanding their effect on non-policyholders, the activities unquestionably grow out of, and are tied to, the claims adjustment and settlement process." Proctor at 268.

Respondents argue that; "No district or appellate court has ever rendered a conflicting opinion with respect to the kind of claims adjust-

ment activity here". (Respondents' Brief at 12) While Proctor does not deal with peer review, the Appeals Court certainly adopted the same "claims adjustment" theory as Respondents here proffer. Yet this Court vacated and remanded Proctor for reconsideration after its decision in Royal Drug (47 U.S.L.W. 3586),(U.S. March 5, 1979).

Moreover, as pointed out by Judge Hall in dissent in the instant case, the insurance company defendants maintained in district court, "disposition of this case is simplified because the McCarran Act questions it raises have been disposed of in at least five recent cases . . . with facts not materially distinguishable from those involved here". Insurance Company Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 7. The cases relied upon included the District Court's holding in Royal Drug that the pharmacy

agreements were the business of insurance. 415 F. Supp. 343 (W. D. , Tex, 1976) and Proctor.

Respondents place considerable reliance upon the District Court opinion in Pireno v. New York State Chiropractic Ass'n, 1972-2 (CCH) Trade Cases ¶62,758 (S.D., N.Y. 1979) but their reliance addresses the merits of the case rather than the reasons for or against this Court's granting of certiorari. In actuality, Pireno illustrates the need for further illumination by this Court of the bounds of the business of insurance.

Contrary to Respondent's description of the status of Pireno, (Respondent's Brief at 2, footnote), Appellants brief in that case was filed February 26, 1980. Prior to the filing of Appellees' brief, the parties stipulated that the appeal could be withdrawn, subject to reinstatement, after this Court's determination of whether

or not to grant certiorari in this case. There is no agreement that reinstatement of the Pireno appeal is contingent upon this Courts reviewing the Fourth Circuit opinion here. Obviously, the parties in Pireno are simply holding their appeal in abeyance to have the benefit of further clarification by this Court should certiorari be granted here. Thus the status in Pireno actually demonstrates the need for this Court to resolve continuing conflicts as to the parameters of the "business of insurance" issue.

Thus plaintiffs maintain that the Fourth Circuit opinion here is in conflict with opinions of the Fifth and Ninth Circuits, with the only other Circuit which has ruled on the matter, (the D. C. Circuit in Proctor), recently remanding to the District Court for reconsideration after Royal Drug. Appeals are pending in three Courts of Appeals and there are conflicts with presently unappealed District Courts as well.

For all of these reasons and those contained in the Petition, Petitioners respectfully pray that a writ of certiorari issue to review the opinion of the Fourth Circuit herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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